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No. 236

IN THE

Supreme Court of the United States

October Term, 1948

BAYUK CIGARS, INCORPORATED,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent,

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE SUPREME COURT OF THE UNITED STATES

No. 236 October Term, 1948

BAYUK CIGARS, INCORPORATED,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent,

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania.

BRIEF FOR RESPONDENT IN OPPOSITION

CORRECTIONS TO PETITIONER'S STATEMENT OF THE CASE

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1. In Petitioner's Statement of the Case on page 8 of its Petition and Brief it is inaccurately stated as a fact that "Portions of the tobacco imported from foreign countries and stored in bonded ware-

houses are sold". No reference is made to any portion of the record that warrants this statement as a fact in this case. Those requests for findings of fact both by petitioner (58a to 64a) and by respondent (50a to 53a) which were affirmed by the trial court were adopted as the findings of the court (87a). At no time was a request made that the statement referred to be found as a fact, and the trial court made no such finding. (Substantially the same inaccurate statement appears in Petitioner's Summary Statement of Matter Involved on page 2 of its Petition and Brief.)

The accurate statement of fact as found by the trial court is that petitioner is engaged in the manufacture and sale of cigars, and in the course of its business activities in the Commonwealth of Pennsylvania imports tobacco from foreign countries for use in this Commonwealth (50a).

2. In its Statement of the Case Petitioner has omitted to state that the figure $8,159,621.63, reported to respondent in petitioner's foreign bonus report as reflecting the greatest amount of capital employed in Pennsylvania at any one time during the year 1941, included $259,963.65 of imported tobacco stored in petitioner's plant (70a, 71a).

3. In Petitioner's Statement of the Case on page 9 of its Petition and Brief it is inaccurately stated:

Corrections to Petitioner's Statement of the Case

> "On December 11, 1942, petitioner filed with the Department of Revenue a petition requesting that there be eliminated from the $10,860,647 of capital determined by the Commonwealth's taxing officers to be employed in Pennsylvania the value of tobacco imported from foreign countries amounting to $2,960,989."

While reference is made to the Stipulation of Facts, R. 23a, the trial court refused to find this statement as a fact (60a, 61a). The petition for resettlement itself introduced into evidence as Commonwealth's Exhibit No. 2 (33a) indicates that the elimination sought by the petition was limited to $2,701,026 (34a, 35a). It was in subsequent proceedings on petition for review that petitioner claimed not only that the Commonwealth's figure of $10,860,547 was erroneous, but that its own figure of $8,159,621 should be further reduced by $259,963.65, representing the value of imported tobacco stored in its own plant (42a, 43a).

ARGUMENT

I. The nature of the foreign bonus as determined by the court of last resort in Pennsylvania and as recognized by the Supreme Court of the United States.

As a matter preliminary to the discussion of the main questions raised in the petition for writ of certiorari, the fundamental nature of the foreign bonus merits some consideration.

The Act of May 8, 1901, P. L. 150, Section 1, 72 PS Section 1851 provides as follows:

> "From and after the passage of this act all corporations, limited partnerships or joint-stock associations, except foreign insurance companies, chartered or created by or under the laws of any other state, or of the United States, or of any foreign country, whose principal office or chief place of business is located in this commonwealth, or which have any part of their capital actually employed wholly within this state, in addition to complying with the laws now in force as to such corporations, limited partnership or joint-stock associations, shall pay to the state treasurer, for the use of

the commonwealth, a bonus of one-third of one per centum upon the amount of their capital actually employed or to be employed wholly within the state of Pennsylvania, and a like bonus upon each subsequent increase of capital so employed."

The Supreme Court of Pennsylvania has distinguished a bonus from a tax:

Commonwealth v. Erie and Western Transportation Company, 107 Pa. 112 (1884).

Furthermore in construing the very act of 1901 here involved, the Supreme Court of Pennsylvania, the court of last resort in the Commonwealth, has repeatedly held that the bonus is not a tax. It is the consideration for the grant of a privilege or franchise. The bonus imposed upon foreign corporations is the consideration paid the Commonwealth for the privilege of doing business and using property in the Commonwealth.

Commonwealth v. Danville Bessemer Company, 207 Pa. 302, 306; 56 A. 871 (1904);

Commonwealth v. American Steel Hoop Company, 226 Pa. 6; 74 A 617 (1909).

This distinction between a bonus and a tax has been recognized by the Supreme Court of the United States:

Railroad Company v. Maryland, 21 Wall. 456 (1874);

Atlantic Refining Co. v. Virginia, 302 U.S 22 (1937).

In the latter case it has been held that an entrance fee exacted by a state from a foreign corporation for a license to carry on a local business is not a tax but compensation for a privilege, and that the validity of the charge is not dependent upon the method by which the amount is determined.

The amount of the bonus or the consideration due the Commonwealth for the privilege of doing business or using property in the state is *measured by*, not imposed upon, the value of the foreign corporation's "capital actually employed or to be employed wholly within the State of Pennsylvania".

The validity of a bonus, which is required as consideration for the grant of a privilege or franchise that the sovereign could lawfully withhold, is not dependent upon the method prescribed for computing the amount of the bonus:

Atlantic Refining Co. v. Virginia, supra, 26.

This basic proposition as to the fundamental nature of the bonus is undisputed by petitioner and was once more clearly recognized by the trial court in its opinions, and by the decision of the Supreme Court of Pennsylvania in the instant case.

II. The inclusion of the value of imports in the measure of the bonus settlement of a foreign corporation not exclusively engaged in foreign commerce does not violate Article I, Section 10(2) of the United States Constitution.

Respondent has been unable to find any *bonus case* decided by the Supreme Court of the United States holding the inclusion of the value of imports in the measure of a bonus to constitute a violation of the "imports clause" of the United States Constitution or a burden upon foreign commerce.

Nevertheless, the Supreme Court of the United States has heretofore determined, even in *tax cases*, that the inclusion of otherwise non-taxable property in the measure of a privilege or franchise tax meets with no constitutional objection:

Property used in interstate commerce included:

International Shoe Co. v. Shartel, 279 U. S. 429, (1929) and

Southern Gas Corporation v. Alabama, 301 U. S. 148, 157 (1937).

Property outside the state's jurisdiction represented by capital stock included:

Ford Motor Company v. Beauchamp, 308 U. S. 331, 336 (1939);

Commonwealth v. Ford Motor Company, 350 Pa. 236, 246 (1944), appeal dismissed 324 U. S. 827 (1945), rehearing denied 324 U. S. 890 (1945);

Commonwealth v. Quaker Oats Company, 350 Pa. 253, 260, 261 (1944), appeal dismissed 324 U. S. 827 (1945), rehearing denied 324 U. S. 890 (1945).

Non-taxable securities included:

Flint v. Stone Tracy Company, 220 U. S. 107, 165 (1911);

Commonwealth v. Ford Motor Company, supra.

Interstate sales receipts included:

Commonwealth v. Quaker Oats Company, supra.

Capital used in purchase of imports and their sale in original packages included:

New York State v. Roberts, 171 U. S. 658 (1898).

New York State v. Roberts, supra, involved a State franchise tax measured upon a base which included capital invested in the purchase of imported crude drugs and their sale in original packages. In upholding the validity of the franchise tax Mr.

Justice Shiras said for the Supreme Court at p. 664:

> "Again, it is said that, even assuming that the importation of crude drugs and their sale in the original packages constituted a portion of the corporate business, no tax could be imposed by the State under the doctrine of Brown v. Maryland, 12 Wheat. 419.
>
> "But that case is inapplicable. Here no tax is sought to be imposed directly on imported articles or on their sale. *This is a tax imposed on the business of a corporation, consisting in the storage and distribution of various kinds of goods, some products of their own manufacture and some imported articles. From the very nature of the tax, being laid as a tax upon the franchise of doing business as a corporation, it cannot be affected in any way by the character of the property in which its capital stock is invested.* Society for Savings v. Coite, 6 Wall. 594; Provident Institution v. Massachusetts, 6 Wall. 611; Pombina Mining Co. v. Pennsylvania, 125 U. S. 181; Home Insurance Co. v. New York, 134 U. S. 594."
>
> (Italics ours)

The principle enunciated in the above cited tax cases has, it is submitted a fortiori applicability to the instant bonus case. As in the Roberts case,

so here, "no tax is sought to be imposed directly on imported articles or on their sale" and hence "from the very nature of the tax (bonus, in this case) * * * it cannot be affected in any way by the character of the property in which its capital stock is invested".

It is respectfully submitted that the doctrine of *Brown v. Maryland*, 12 Wheat. 419, having been held inapplicable in the Roberts case, is likewise inapplicable to the facts of the instant case.

Brown v. Maryland, supra, is clearly inapplicable to the instant case for additional reasons. In that case a flat fifty-dollar license tax was annually imposed on the business of importers; in the instant case the bonus is a one-time non-recurring charge, not exacted or paid by reason of petitioner's importing goods, but rather for the privilege of doing business or using property in the state, and measured by the capital employed or to be employed wholly within the State of Pennsylvania. Petitioner here is not engaged exclusively in the business of importing tobacco.

Anglo-Chilean Nitrate Sales Corporation v. State of Alabama, 288 U. S. 218 (1933)[1] is relied upon by petitioner. This case is clearly inapplicable. For there the taxed corporation was engaged *exclusively*

[1] Explained in *Southern Gas Corporation v. Alabama, supra*, 148, 153.

in foreign commerce and the tax as construed by the Supreme Court of Alabama was levied upon the *actual doing of business,* not on the right or privilege to do business. In the instant case on the other hand the bonus, as construed by the Supreme Court of Pennsylvania, is a charge for the privilege of doing business or using property in the state and the petitioner is *not* engaged *exclusively* in foreign commerce. On the same ground of distinction the Supreme Court of the United States, in its opinion in the case relied upon, differentiated the Roberts case, supra, by stating at p. 228:

> "And, as admittedly the corporation (in the Roberts case) did a local business in that state, i.e., business not included in interstate or foreign commerce, that case is essentially different from this one."

It is respectfully submitted that under the authorities cited, and particularly under the decision in *New York State v. Roberts, supra,* the inclusion of the value of imports in the measure of the bonus settlement against petitioner does not violate Article I, Section 10(2) of the Constitution of the United States.

III. The inclusion of the value of imports in the measure of the bonus settlement of a foreign corporation not exclusively engaged in foreign commerce does not violate Article I, Section 8(3) of the United States Constitution.

As respondent has pointed out earlier in its brief, it has been unable to find any *bonus case*, decided by the Supreme Court of the United States holding the inclusion of the value of imports in the measure of a bonus to constitute a violation of the "commerce clause" of the United States Constitution or an interference with power of Congress to regulate foreign commerce. Nevertheless, the Supreme Court of the United States has heretofore determined, even in *tax cases* that a state excise tax which affects commerce, not directly, but only incidentally and remotely may be entirely valid where it is clear that it is not imposed with the covert purpose or with the effect of defeating federal constitutional rights.

Postal Telegraph Cable Company v. Adams, 155 U. S. 688, 696 (1895);

Kansas City, Memphis & Birmingham Railroad Company v. States, 242 U. S. 111, 119 (1916);

Hump Hairpin Co. v. Emmerson, 258 U. S. 290, 294, 295 (1922);

Petitioner herein never has suggested, and does not now suggest, that the Bonus Act of 1901 was imposed by the Commonwealth of Pennsylvania with the covert purpose or with the effect of defeating federal constitutional rights. The Supreme Court of Pennsylvania in the instant case, 359 Pa. 202 (1948), has succinctly pointed out that the bonus was neither directed at imports as such, nor has any burden been placed thereby upon foreign commerce. At page 211 of the decision it is stated:

> "* * * The bonus payment required by the Act here involved is not directed in the slightest way against any particular property, as such, whether it be imported or domestic; and no impost or burden is placed upon the company's goods as being either foreign or interstate commerce. In fact, the bonus is not a recurring charge. So long as the total value of the capital employed or to be employed within the State remains less than the greatest amount thereof upon which the bonus has been paid at any one time, the company will have no additional bonus to pay; indeed, it is possible for the company to import tobacco recurrently and use the same in its business in Pennsylvania, *ad infinitum,* without incurring one penny of additional bonus liability."

Argument

The case of *McGoldrick v. Gulf Oil Corporation*, 309 U. S. 414 (1940) cited by petitioner, involves a tax on *sales* in foreign commerce of oil held in a government bonded warehouse and withdrawn only for exportation for sale as supplies to ships' stores of vessels in foreign commerce. The tax in this case is a sales tax on the purchaser to be collected by the seller. This case is totally different on its facts from the present case, since in the former case Federal regulations cover the entire movement of the oil from the time of importation to the time of exportation for sale in foreign commerce. Under these regulations one complete process was sought to be regulated. There could be no intervening diversion of the oil within the country. The instant case does not involve a sales tax, but rather the measure of the value of a foreign corporation's privilege of doing business or employing capital within the Commonwealth.

The capital in question is imported tobacco stored in government bonded warehouses located in Pennsylvania for use in Pennsylvania in the manufacture and sale of cigars. In the *McGoldrick* case a definite and direct correlation existed between the tax imposed and the sales of the product—the more sales, the more tax. In the present case no such correlation exists. The bonus charge is independent of the extent or value of the imports as such. The burden, if any, upon imports resulting from the

imposition of a bonus charge is incidental, fortuitous and remote.

The decision of the Supreme Court of the United States in the case of *Brown v. Maryland,* supra, is based upon both Article I, Section 10(2), and Article I, Section 8(3), of the Constitution of the United States. Subsequently the Supreme Court in *New York v. Roberts, supra,* involving a State franchise tax measured upon a base which included continuing capital used in the purchase of imported crude drugs and their sale in original packages, held the case of *Brown v. Maryland* inapplicable. It is respectfully submitted that the decision in the *Roberts* case constitutes a determination by the Supreme Court of the United States of the legal issues raised by the facts of the instant case.

IV. CONCLUSION

It is, therefore, respectfully submitted that the highest court in Pennsylvania has construed the foreign bonus required by the Act of May 8, 1901, P. L. 150, as being not a tax, but a charge or consideration payable to the Commonwealth of Pennsylvania by a foreign corporation for the privilege of doing business or using property in the state, measured by the value of the capital actually employed or to be employed wholly within the state, and that such distinction has been recognized by the Supreme Court of the United States; and secondly,

The decision of the Supreme Court of Pennsylvania that the inclusion of the value of imports in the measure of the bonus settlement of a foreign corporation not exclusively engaged in foreign commerce violates neither Article I, Section 10(2) nor Article I, Section 8(3) of the Constitution of the United States, does not involve a federal question of substance not heretofore determined by the Supreme Court of the United States, but is in accord with the applicable decisions thereof.

Accordingly, it is respectfully submitted that the petition for writ of certiorari be denied.

Respectfully submitted,
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